IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

URRAY A. A. MURPHY, Petitioner-Appellant, vs. OUIS S. NELSON, Warden, alifornia State Prison, Tamal, alifornia, Respondent-Appellee.	)	NO. 22686

BRIEF OF APPELLEE

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FILED

SEP 3 1968

WM. B. LUCK, CLERK

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BRIEF OF APPELLEE

JURISDICTION

The jurisdiction of this Court to entertain this ppeal from the District Court's denial of appellant's peti-ion for a writ of habeas corpus is conferred by Title 28, nited States Code section 2253, which makes a final order n a habeas corpus proceeding reviewable in the Court of ppeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

Appellant, Murray A. A. Murphy, was convicted after rial in the Superior Court of the State of California for he County of San Mateo of burglary on September 11, 1963, nd was granted probation. On May 19, 1965, he was convicted pon a plea of guilty of possession of marijuana and being a elon in possession of a weapon. Criminal proceedings in hat matter were suspended and appellant was remanded to the

alifornia Rehabilitation Center for treatment of his nar-
otics addiction problem. The director of that institution
ound him to be unfit for treatment and on January 6, 1966,
e was sentenced to a term of one to ten years upon his
arcotics conviction and not to exceed fifteen years for
eing a felon in possession of a weapon conviction. The
ollowing day probation was revoked on his earlier burglary
onviction and he was sentenced to a term of five years to
ife. All of these sentences were made concurrent.

Appellant filed notices of appeal to the California
ourt of Appeal from all of these convictions. Since the
otice of appeal from his burglary conviction was almost
hree years late appellant applied for, and was granted,
elief under California Rules of Court 31(a) (relief from
ate filing). These appeals are presently pending in the
alifornia Court of Appeal and are numbered 1/Criminal 5936
appeal from the 1963 burglary conviction) and 1/Criminal
937 (appeal from the 1965 narcotics and possession of a
eapon conviction).

On September 19, 1966, the records on appeal were
repared and forwarded to appellant. His application for
ugmentation of the record on appeal was denied on
ctober 21, 1966, as was his request to be provided with
eference volumes and typing paper. Appellant filed an
pplication for the appointment of counsel to represent him
n appeal on August 18, 1967, and the Court of Appeal appointed
. William Simmons, Esq., to represent him.

B. Proceedings in the Federal Court.

On May 17, 1967, appellant filed a petition for a rit of habeas corpus in the United States District Court for he Northern District of California, Southern Division [No. 7266] and an order to show cause was issued. Appellee, espondent below, filed a return to that order on September 15, 967. C. William Simmons, having previously been appointed o represent appellant in his appeal before the California ourt of Appeal, was appointed by the United States District ourt to represent appellant in further proceedings before hat Court. Through his attorney appellant filed a traverse o our return on November 6, 1967, and a hearing on the order o show cause was held before the Honorable George B. Harris, nited States District Judge, on November 17, 1967.

On December 6, 1967, the District Court denied the etition for writ of habeas corpus without prejudice to its enewal and discharged the order to show cause. The District ourt concluded that the proper forum for the resolution of he issue raised by appellant is the California Court of Appeal y way of a renewed application for augmentation of his record n appeal.

Appellant, through his attorney, moved for a re-earing on the basis of the then recent United States Supreme ourt case of Roberts v. LaVallee, 389 U.S. 40 (October 23, 967). On January 2, 1968, the merits of this motion were rgued before the District Court which denied appellant's otion for rehearing on January 16, 1968. Appellant applied

for and was granted a certificate of probable cause to appeal.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DECLINED TO ENTERTAIN APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS WHILE HE HAD AN APPEAL PENDING IN THE CALIFORNIA COURT OF APPEAL.

The Federal District Court may dismiss a petition for habeas corpus without an evidentiary hearing when, as a matter of law, the facts alleged in the petition do not constitute grounds for relief in a federal court. If the petition cannot be disposed of on purely legal grounds, then the District Court must determine from an examination of the entire record whether or not an evidentiary hearing would serve the ends of justice. Schlette v. California, 284 F.2d 827, 834 (9th Cir. 1960); Muhlenbraich v. Heinze, 281 F.2d 881, 883 (9th Cir. 1960).

As stated by this Court recently in Martinez v. Craven, ___ F.2d ___ (9th Cir. No. 22136, July 8, 1968):

> "28 U.S.C. § 2254(b) and (c) provide, in substance, that an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective

to protect the rights of the prisoner, and that the applicant shall not be deemed to have exhausted the remedies available in the courts of the state if he has the right under the law of the state to raise, by any available procedure, the question presented."

ere, as in Martinez, at the time appellant filed his applica-
ion for the writ he had a direct appeal from his conviction
ending in the California Court of Appeal. Wherefore, appellee
ubmits that appellant had not exhausted the remedies available
o him in the courts of the State of California, and accord-
ngly the District Court properly refused to consider his
pplication until a proper motion for augmentation has been
ade in the California Court of Appeal.

II

APPELLANT'S REMAINING POINTS ON APPEAL ARE WITHOUT MERIT.

Appellant complains that he was ineffectively repre-
ented by C. William Simmons at the hearing held to determine
hether or not an evidentiary hearing was required. Appellee
ubmits that since the District Court is not constitutionally
ompelled to appoint counsel to represent petitioners in
abeas corpus proceedings before the federal courts [Dorsey v.
ill, 348 F.2d 857, 877, cert. denied 325 U.S. 890 (D.C. 1945);
ccord, Flowers v. Oklahoma, 356 F.2d 916, 917 (10th Cir.
966)], appellant's contention that he was ineffectively

epresented is without merit.[1] Appellee submits that since he District Court declined to entertain appellant's petition n a question of law -- his existing state remedy -- the uality of representation afforded by C. William Simmons is mmaterial to the issues raised in the present appeal. Furthere, the record in this case reveals that this charge is aseless.

Appellant also complains of the District Court's ailure to conform the order denying his petition with Federal ules of Civil Procedure, Rule 52(a) which requires findings of act and conclusions of law. The Federal Rules of Civil rocedure do not generally apply to habeas corpus proceedings Rule 81(a)(2); accord, Albert v. Patterson, 155 F.2d 429, 33 (1st Cir. 1946), cert. denied 329 U.S. 739; McCann v. dams, 3 F.R.D. 396, 404 (D.C. N.Y. 1944)], and the District ourt followed the procedure announced by this Court in uby v. United States, 341 F.2d 585, 587 (9th Cir. 1965), ert. denied 384 U.S. 979, by not applying Rule 52(a) to an rder denying a petition for habeas corpus in the initial stage.

We submit that appellant's reliance on Roberts v. aVallee, 389 U.S. 40 (1967) is misplaced. In LaVallee the

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1. Compare, Dillon v. United States, 307 F.2d 445, 447-8 (9th Cir. 1962), wherein it was stated that unless a fair nd meaningful hearing cannot be held without the aid of ounsel because the presentation of the issue requires the ility to organize factual data or to call witnesses and licit testimony there is no constitutional right to counsel n habeas corpus proceedings.

denial of a transcript of the preliminary hearing without prepayment was held to go to the very fairness of the trial which resulted in a conviction affirmed on appeal. Thus, the most obvious distinguishing difference between LaVallee and the instant case is that LaVallee had exhausted his state remedy of direct appeal, whereas the only reason we are here in this case is that appellant has refused to perfect his direct appeal from his conviction in the California courts.

In the instant case, appellant has not been denied any transcripts because he is an indigent, but rather because he has not made a proper motion for augmentation, a motion which the California Court of Appeal has expressed a willingness to grant. Wherefore, appellee respectfully submits that the District Court properly denied appellant's petition without prejudice to its renewal if he is unable to secure relief in the California courts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the District Court denying appellant's petition for writ of habeas corpus should be affirmed.

DATED: September 3, 1968.

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